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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: Our second case is  
4 Case 12-417, Sandifer v. United States Steel.

5 Mr. Schnapper?

6 ORAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHNAPPER: Mr. Chief Justice, and may  
9 it please the Court:

10 We agree with the government that not  
11 everything an individual wears is clothes. We disagree  
12 with the government as to the appropriate standard for  
13 distinguishing things that are and are not clothes under  
14 Section 203(o).

15 I'd like to begin with the area we're -- in  
16 which we are in agreement with the government, although  
17 not with Respondent. In ordinary parlance, not  
18 everything an individual wears would be referred to as  
19 clothes.

20 There are examples of that in this  
21 courtroom: Glasses, necklaces, earrings, wristwatches.  
22 There may be a toupee, for all we know. Those things  
23 are not commonly referred to as clothes.

24 JUSTICE SCALIA: I resent that.  
25 (Laughter.)

1                   MR. SCHNAPPER:                 And nor are neck braces,  
2                   which I've seen one in this courtroom. It's also the  
3                   case that there are any number of things that people  
4                   wear to do their jobs that are not clothes. The police  
5                   officers outside the building are wearing guns, radios.

6                   I suspect they have handcuffs; I couldn't  
7                   see those. The quarterback who played for your team  
8                   yesterday had a quarterback playbook wristband with the  
9                   plays on -- on his -- on his wrist.

10                  Workers wear tool belts.           It's -- one of the  
11                  recurring -- recurring issues that has come up in these  
12                  cases are knife scabbards. We don't think anyone would,  
13                  in ordinary parlance, call those things clothes. And we  
14                  think that's the significant limitation on this.

15                  The -- the company's account of this is that  
16                  everything that you wear to do your job is -- is  
17                  clothes, and we think that's just not consistent with  
18                  ordinary language. And although the government's views  
19                  have, to some extent, evolved over time in all of this,  
20                  they've always taken the position that not everything  
21                  you wear are clothes.

22                  Even in its -- in the 2002 opinion letter,  
23                  they drew the line at tools and scabbards. And so even  
24                  though you could be wearing those things, those are not  
25                  clothes.

1 JUSTICE SCALIA: Tools and what?

2 MR. SCHNAPPER: Scabbards.

3 JUSTICE SCALIA: Scabbards.

4 MR. SCHNAPPER: Knife scabbards. The Tenth  
5 Circuit holds a knife scabbard as clothes because it's  
6 like holsters. I --

7 JUSTICE GINSBURG: But we're dealing with  
8 here, from the picture, that looks like clothes to me.

9 MR. SCHNAPPER: Your Honor, I think that  
10 your question raises an excellent point. One of the  
11 problems with the picture is that it withholds from you  
12 other information that you would use to assess whether  
13 to describe it as clothes. You don't know what --

14 JUSTICE KENNEDY: Except you would look and  
15 say, those clothes probably have something special  
16 underneath them. I mean, in ordinary parlance I think  
17 that would be a proper use of diction.

18 MR. SCHNAPPER: If you saw an airbag jacket,  
19 you would probably call it clothes, unless you are an  
20 equestrian. It looks like a jacket. If you saw a  
21 compression torsion -- a torso compression bandage, in a  
22 photograph, you would call it clothes because you don't  
23 have all the relevant information.

24 JUSTICE ALITO: Well, why is it that the  
25 jacket and the pants in that picture are not clothes?

1                   MR. SCHNAPPER:           In our view -- well, let  
2       me -- part of it -- well, first of all, they are  
3       designed for a protective function, to protect you from  
4       catching fire.

5                   JUSTICE ALITO:           Well, this is one of the  
6       aspects of your argument that seems really puzzling to  
7       me. I don't know when -- when a human being first got  
8       the idea of putting on clothing. I think it was one of  
9       the main reasons -- probably the main reason was for  
10      protection. It's for protection against the cold. It's  
11      for protection against the sun. It's for protection  
12      against -- against thorns.

13                  So you want us to hold that items that are  
14       worn for purposes of protection are not clothing?

15                  MR. SCHNAPPER:           No, Your Honor. We've  
16       been -- we've tried to be quite specific about that. We  
17       distinguish between items that are designed and worn to  
18       protect from a workplace hazard. And the court of  
19       appeals argued that everything is, in a sense,  
20       protective.

21                  That is not the standard that we propose.  
22       Workplace hazards are -- are different. And in ordinary  
23       usage, when things are being used for that kind of  
24       protection, they are typically described in other terms.

25                  JUSTICE ALITO:           So if it -- if it protects

1      against something other than workplace hazard, it can be  
2      clothes. But if it protects against a workplace hazard,  
3      it isn't clothing. Is that your test? Excuse me.

4                    MR. SCHNAPPER:                 And it's designed to provide  
5      that kind of protection. Let me explain why -- why  
6      we've added that. There are some instances in which one  
7      would wear ordinary clothing on the job, things that are  
8      no different from what you would buy at J.C. Penney's,  
9      because it was, to some degree, protective from a  
10     workplace hazard.

11                  That's true here.                 Whatever else you are  
12     wearing, underneath it, you have to wear cotton or wool.  
13     You can't wear --

14                  JUSTICE ALITO:                 But what if you are working  
15     out in the sun? So you are wearing clothing, so that  
16     you don't get burned by the sun. What if you are  
17     working out in the cold and you wear a parka, so that  
18     you don't freeze while you're working? Are those  
19     workplace hazards?

20                  MR. SCHNAPPER:                 I don't think, in ordinary  
21     parlance, they would be called a workplace hazard. I  
22     mean, that's just -- that's just the normal vicissitudes  
23     of life. But to give you an example of --

24                  JUSTICE SOTOMAYOR:             So the guy who works in  
25     a freezer is not experiencing a normal hazard? So

1 the --

2 MR. SCHNAPPER: I submit -- I think that --  
3 that you would be wearing a parka in a freezer just  
4 because it was warmer. I mean, if you stayed there all  
5 day, it would be dangerous. Dangerous cold is the South  
6 Pole. The South Pole is a hazard.

7 There will be times when the weather  
8 forecast will be it's so cold that it's dangerous to go  
9 outside. And I think it's that degree of --

10 JUSTICE SOTOMAYOR: So you have to pay a  
11 worker who's in the South Pole overtime for putting on  
12 his parka?

13 MR. SCHNAPPER: Well, you put on more than a  
14 parka. I think that's -- that's the point --

15 JUSTICE SOTOMAYOR: To put on his leggings  
16 and things like that?

17 MR. SCHNAPPER: There's a whole lot of stuff  
18 that I'm sure he puts on.

19 JUSTICE SCALIA: I lived in Chicago when it  
20 never got above zero for two weeks.

21 MR. SCHNAPPER: There would come a point  
22 where -- where I think people would call it a hazard in  
23 ordinary English.

24 JUSTICE KAGAN: But --

25 MR. SCHNAPPER: But those -- those are not

1 the cases that come up. I mean, we have given you, in  
2 an appendix to our reply brief, a list of all the cases  
3 in the last 20 years that we could find involving 203.  
4 That's not what actually happens.

5 I mean, we are trying to give you something  
6 that makes sense of what's going on. The overwhelming  
7 majority of cases involve things everyone would call a  
8 hazard -- knives, molten metal, acids.

9 JUSTICE SOTOMAYOR: I have -- I do have an  
10 understanding that you're right, that jewelry are not  
11 clothes, that toupees might not be, that makeup is not,  
12 and they cover the body. So I agree that a definition  
13 that says anything that covers the body might go too  
14 far.

15 But I do have a problem with things that  
16 look like clothes. If I don't buy your -- your argument  
17 that fire-resistant pants and shirts are not clothes,  
18 where would you propose I draw the line? Assume I say  
19 you are wrong at least -- if it looks like clothes, it  
20 is clothes.

21 Let's apply a little bit of common sense to  
22 life.

23 MR. SCHNAPPER: I'm not entirely sure  
24 where -- what we would fall back to -- let me -- let me  
25 respond to that question, though, the premise of it a

1      little bit.

2            There is -- there is an old saying that, if  
3      it looks like a duck and it swims like a duck and it  
4      quacks like a duck, it's a duck.

5            JUSTICE SOTOMAYOR:                It's a very famous  
6      saying.

7            (Laughter.)

8            MR. SCHNAPPER:                Right, right. Well,  
9      there's -- there's -- but part of the takeaway from that  
10     is you have -- whether you call something a duck,  
11     depends on all the information you have. Let me  
12     change -- let me change it a little bit.

13            It looks like a duck, it's floating there in  
14     the water, there is a quacking sound, and there are some  
15     men in a shed wearing camouflage gear and guns; it's  
16     probably not a duck. And yet, if you took a picture of  
17     just the duck --

18            JUSTICE SCALIA:                You don't want to say they  
19     are "wearing guns," not in this case.

20            (Laughter.)

21            MR. SCHNAPPER:                No, they are wearing  
22     camouflage and holding guns.

23            JUSTICE SCALIA:                And holding guns.

24            MR. SCHNAPPER:                Holding. I certainly  
25     misspoke.

1                             (Laughter.)

2                             MR. SCHNAPPER:                 I certainly -- yes. But --  
3                             but our point is whether -- how you characterize  
4                             something depends on all the information. Now, you may  
5                             want to -- you may want to conclude, although I think it  
6                             would be wrong, that even when you have all the  
7                             information, even if you understand that this is  
8                             protective in nature, you understand that it has to be  
9                             worn because of very severe dangers.

10                          You understand that the person is wearing a  
11                          hood over his head, not because it's cold, but because,  
12                          although it's probably 100 degrees where he is working,  
13                          he is in danger of being burned if he doesn't wear it.  
14                          If, after that, you call it clothes, I disagree with  
15                          you. But I think that's at least the right way to  
16                          analyze it.

17                          But to say a picture looks like clothes is  
18                          to -- is to ask how we would characterize something if  
19                          we didn't have all the information. That is certainly  
20                          inappropriate. You have to assess it with all the other  
21                          things that you know and in the full context.

22                          JUSTICE BREYER:                 I have an underlying  
23                          question, just for my understanding of this. Now, the  
24                          unions are on your side and -- I think, and I wondered  
25                          why. And I'll -- this is my thought, which suggests

1       that -- that I may not understand this perfectly.

2           It seemed like, to me, a brilliant statute,  
3 because if, in fact, the unions -- those they represent,  
4 the workers, don't want -- want to be paid for donning  
5 and doffing, all they have to do is not put something in  
6 the collective bargaining agreement.

7           But -- and if they do put something in the  
8 collective bargaining agreement, they can exert their  
9 bargaining power to get something else, which they must  
10 want more. So what you with your narrow definition do  
11 is you prevent the workers from doing that. And so I  
12 don't know why the ordinary worker would be on your side  
13 of it.

14           Now, I say that because I want you to  
15 explain what I'm missing.

16           MR. SCHNAPPER:                   I am delighted that you  
17 asked that question. It raises a number of issues, some  
18 of them having to do with the way the statute operates  
19 today, some of them historical.

20           Let me start with the way the statute  
21 operates today. You said, to paraphrase, all they have  
22 to do is not put something in the agreement and then  
23 they have to be paid.

24           JUSTICE BREYER:                  Yes.

25           MR. SCHNAPPER:                  That is not what the statute

1 says, and it's not the way it works. The statute says  
2 in the agreement or a custom under the agreement.

3 The lower courts, as we've explained in our  
4 reply brief, have taken the position that what that  
5 means is, if there is a collective bargaining agreement  
6 and it doesn't expressly require that they be paid for  
7 the stuff, then not paying for it is a custom under the  
8 contract.

9 And so what actually happens is, in this  
10 negotiation -- and that is described in one of these  
11 cases, the gear changes over time. An employer comes in  
12 and says, I want you to wear some additional gear. The  
13 union objects and says, that -- that's wrong, we ought  
14 to be paid for it.

15 They don't succeed in negotiating --

16 JUSTICE BREYER: I see, that's where the  
17 problem lies.

18 MR. SCHNAPPER: It goes the other way.

19 JUSTICE BREYER: Is there a way around that  
20 that doesn't involve this case, the Secretary of Labor?  
21 Or I guess you can amend the statute. That's tough. I  
22 mean --

23 MR. SCHNAPPER: Well, that's the way the  
24 statute works now, and that explains -- it's part of the  
25 reason why they are there. But there's something

1 broader, and this will take a minute, but the historical  
2 context is uniquely important to understanding why there  
3 was opposition to this at the time. It's sort of a  
4 three-act play, so bear with me.

5 The first has to do with the three lawsuits  
6 that lead to the Portal-to-Portal Act. Those are  
7 lawsuits between employers and unions. The CIO, at this  
8 point in time, was advancing the rights of workers and  
9 interests of workers in two ways: A, in negotiations;  
10 and, B, if they couldn't get something in negotiations,  
11 but they thought it was required under the Fair Labor  
12 Standards Act, then they would sue, or they would take  
13 the position in negotiations that you have to be  
14 provided. There is a 1991 Buffalo Law Review article  
15 that describes this history.

16 In one of those cases, the union actually  
17 struck unsuccessfully for this and then proceeded on a  
18 legal track. So that was what the CIO was doing. They  
19 wanted both -- they wanted both the statute and  
20 negotiation.

21 In the House version of the Portal-to-Portal  
22 Act, Section 3 effectively banned that. Section 3 said  
23 if this -- if something's going on, and it's a company  
24 practice, and it doesn't violate the collective  
25 bargaining agreement, it's legal.

1           It grandfathered -- and this was -- the CIO  
2   objected to this. And this was not adopted. It  
3   grandfathered in all existing violations. Indeed, it --  
4   it prospectively grandfathered things in, because if  
5   they would adopt a new practice, it would be illegal.

6           And the example that the CIO gave was to  
7   pose it was the practice of the employer to turn back  
8   the clock an hour every day. And that would have  
9   been -- that would have been permitted. So the Senate  
10   rejected that, and it didn't end up in the bill.

11          Now, what happens is this comes back in  
12   another version in 1949 with a very different Congress.  
13   And -- and my brother has referenced the -- a comment --  
14   it's buried in the long statement by the National  
15   Association of Manufacturers -- essentially asking for  
16   the -- this old language. They did it a little bit  
17   differently.

18          It -- it would be a mistake to assume  
19   Congress just picked up the work of the last Congress in  
20   '49 and said, oh, well, we didn't -- all we were trying  
21   to accomplish didn't get accomplished, so let's work on  
22   it some more. The '48 elections had completely changed  
23   Congress.

24          As you may recall, Dewey did not win that  
25   election. The Republicans lost the House. They lost

1 the Senate. The sponsor of the House bill was defeated,  
2 and the new members of the House and Senate included  
3 Hubert Humphrey and Gene McCarthy and a very different  
4 group of people.

5 They were not there to further the -- the  
6 agenda of the last Congress. The Herder Amendment was a  
7 somewhat -- the -- not what was adoptable -- what was  
8 proposed was a version of this.

9 It said anything about the length of the  
10 workday is -- is legal if it's in a contract or in a  
11 custom or practice under a contract. It doesn't --  
12 didn't -- we know from experience that custom or  
13 practice under a contract works to grandfather things --  
14 old things and new things.

15 It went over to the Senate, and the Senate  
16 rejected that and then ended up with this narrowly drawn  
17 provision.

18 CHIEF JUSTICE ROBERTS: Counsel --

19 MR. SCHNAPPER: Sorry that's so long, but  
20 that's why.

21 CHIEF JUSTICE ROBERTS: We began with the  
22 assumption that the unions are on your side. Is the  
23 United Steelworkers of America on your side?

24 MR. SCHNAPPER: No, they have not filed.  
25 They -- they agreed in the last collective bargaining

1 agreement not -- not to file.

2 CHIEF JUSTICE ROBERTS: Well, it does seem  
3 to support to notion that this is something that should  
4 be left to the collective bargaining process.

5 MR. SCHNAPPER: Your Honor, it's not  
6 being -- the view of -- of the opponents of this kind of  
7 proposal, which was defeatedly -- repeatedly directed,  
8 was it isn't being let -- you're -- you're essentially  
9 carving unionized plants out of the protections of the  
10 statutes.

11 You're stripping the workers of their  
12 statutory rights and saying to a union, if you can  
13 negotiate for something, that's fine, but the -- but the  
14 statute --

15 CHIEF JUSTICE ROBERTS: No, the point would  
16 be that the steelworkers gave up something when -- you  
17 know, it's part of a bargain. Okay? If they say, all  
18 right, we're not going to count this time, but -- you  
19 know, you've got to give us ten more cents an hour or --  
20 you know, greater cafeteria facilities or something.  
21 It's a normal part of the bargaining process.

22 And it seems to me that, if they're willing  
23 to give it up to get something else, what's -- what's  
24 the benefit to them of saying you can't do that?

25 MR. SCHNAPPER: If I -- again, if I might

1 return to the first part of my answer to  
2 Justice Breyer's question. The way this ordinarily  
3 works, and it's reflective in cases we've described in  
4 our yellow brief, is that the company's position is this  
5 is -- we don't need your permission to do this.

6 And -- and that's true -- that's true in one  
7 sense, which is if it's not committed -- unless the  
8 contract bans it, it becomes a de facto practice, and  
9 it's legal. But it's also usually the company's  
10 position that -- that the union is wrong about the  
11 meaning of Fair Labor Standards Act.

12 There's a dispute in this case on the part  
13 of the company as to whether this is a principal  
14 activity. They've argued it's -- so this is an issue  
15 about which people bargain the way they would bargain  
16 about an extra holiday. But it is not a situation where  
17 the union walks in, is entitled to this, and trades it  
18 for something. That simply isn't what's going on.

19 JUSTICE ALITO: No, but if the union -- is  
20 it consistent with the union's duty to represent your  
21 client for them to bargain away something to which your  
22 clients are entitled under the Fair Labor Standards Act?

23 MR. SCHNAPPER: The company's position is  
24 it's -- it's not something that they're entitled to.

25 JUSTICE ALITO: No, no, the union. If the

1 union --

2 MR. SCHNAPPER: I -- I understand -- I  
3 understand the question. But -- but the union can go in  
4 and say, we think we're entitled to this under the Fair  
5 Labor Standards Act, and the company would say, no, we  
6 don't.

7 And then if they can't get it, it --

8 JUSTICE GINSBURG: Mr. Schnapper, can I ask  
9 you another question? We're talking about time and  
10 whether it will be paid. And we have one worker that  
11 puts on this protective garb. And then we have another,  
12 the baker. It takes them about the same amount of time  
13 to do -- put on everything he has to put on. But  
14 everybody agrees, he doesn't get paid for that. What  
15 is the -- that that would come within the clothing.

16 So we have all kinds of people who have to  
17 wear special uniforms, a doorman at an apartment house.  
18 It takes them time to put it on. Why should there be a  
19 distinction in getting paid between the protective garb  
20 and something that you must wear on the job? That --  
21 yes.

22 MR. SCHNAPPER: Okay. Our answer to that,  
23 Justice Ginsburg, is that the statute says, "clothes,"  
24 it doesn't say, "anything you wear." And we agree with  
25 the government, that there are things you could put on

1       that would not be clothes and that you'd have to be paid  
2       for.

3           And we -- I think we disagree with the  
4       government about what those are. But there's -- but --  
5       and, indeed, the court of appeals in this case and most  
6       courts of appeals have held that there are things you  
7       put on that are not clothes.

8           So the statute distinguishes between clothes  
9       and other things. We have to figure out what that  
10      distinction means.

11          JUSTICE KAGAN:           But I thought that your  
12       distinction was, well, there are two sets of clothes --  
13       to use a better word. There are two sets of clothes,  
14       and they both look like clothes, but one is for  
15       protective -- a protective function, and one is for a  
16       sanitary function. And that's the distinction that you  
17       want to draw.

18          And I guess another way of saying Justice  
19       Ginsburg's question is: Why should we look at a word  
20       that just says, "clothes," and make that distinction as  
21       to what the purpose of changing clothing is, whether  
22       it's for sanitary reasons or whether it's for protective  
23       reasons or whether it's because people want the doormen  
24       to look nice?

25          MR. SCHNAPPER:           Well, Your Honor, I think in

1 ordinary parlance, whether you're going to call  
2 something clothes or not depends, as the government says  
3 at page 25 of its brief, on both its form and its  
4 function. And there's a continuum of things, and you  
5 have to draw a line somewhere.

6 JUSTICE SCALIA: But common usage doesn't  
7 separate from the meaning of clothes only those -- those  
8 protective garments that are required by the occupation,  
9 that are required by the employer. That's a -- that's a  
10 very strange definition of clothes.

11 Hunters, when -- when they're hunting birds  
12 wear -- wear trousers that are brush-proof. They -- you  
13 know, resist briars and other things. Those are  
14 protective. And those -- those pants wouldn't be worn  
15 elsewhere.

16 Now, I can understand you're arguing that  
17 those are not clothes because they perform a protective  
18 function other than heat and cold. But you're -- you're  
19 proposing a very odd definition of clothes. It excludes  
20 only those protective garments that are protection  
21 against workplace hazards. That's very strange.

22 MR. SCHNAPPER: All right. Your Honor --  
23 well, Your Honor, we are not undertaking to give you a  
24 comprehensive definition of what items are and aren't  
25 clothes. The -- the variety of things people wear is --

1      is extraordinarily complicated, and we -- we have not  
2      taken that on.

3            What we have tried to suggest is --

4          JUSTICE SCALIA:                No, but you have taken it  
5      on. You're trying to tell us what is the ordinary  
6      meaning of clothes. That's what you're appealing to,  
7      the ordinary meaning.

8          MR. SCHNAPPER:                Your Honor --

9          JUSTICE SCALIA:                And I suggest the ordinary  
10     meaning is not -- is not what you -- you have proposed.

11        MR. SCHNAPPER:                Well, we may disagree of the  
12     substance, but --

13        JUSTICE SCALIA:                It includes protective  
14     garments, and -- and you want it to include all  
15     protective garments, I guess, except those that protect  
16     against workplace hazards. That's peculiar.

17        MR. SCHNAPPER:                All -- all we're asking the  
18     Court to hold is that certain things are not clothes.  
19     We're not undertaking to sort out among the things that  
20     hunters wear, where you would draw the line. I mean,  
21     ordinary -- ordinary parlance is -- is complicated. But  
22     we think -- look, it's certainly the case, we believe,  
23     that not everything people wear is clothes.

24            And the problem is to fashion a standard.

25     We think the government standard simply doesn't work,

1 and it doesn't work for two reasons. Their standard, as  
2 we understand it -- and my brother will address this in  
3 further detail -- is that the Court should distinguish  
4 between clothes, on the one hand, and equipment,  
5 devices, and tools, on the other.

6 Now, we think this doesn't work for a couple  
7 of reasons. First of all, the -- the distinction isn't  
8 clear. In footnote 6, they note the lower courts have  
9 been divided about gloves, and then say they -- they  
10 think gloves are clothes. They don't explain it.

11 They note that the lower courts have been  
12 divided about leather aprons. At page 24 and 25, they  
13 describe labor board decisions and some other things  
14 which -- which have characterized certain items as --

15 CHIEF JUSTICE ROBERTS: Well, counsel, the  
16 whole approach here -- you are saying you are not going  
17 to give us a test, you are just going to criticize --

18 MR. SCHNAPPER: No, no, no.

19 CHIEF JUSTICE ROBERTS: -- their test. I  
20 mean, it's --

21 MR. SCHNAPPER: No. Our test is an item is  
22 not clothes if it is worn to protect against a workplace  
23 hazard and was designed to protect against hazards.  
24 And -- but -- if I might just finish my point, the  
25 government standard is -- it's not clear how they have

1 gotten where they did. They noticed -- there are  
2 divisions about a number of different things.

3 And then what they describe as on the  
4 not-clothes side of the line on pages 24 and 25 sound a  
5 lot like what people are wearing here.

6 In addition, casting it as the government  
7 has forces the lower courts to decide what are  
8 equipment, tools, and devices because anything that is  
9 not an equipment, tool, or device would end up being  
10 clothes. And that simply recasts the question about  
11 a -- some words that are not in the statute.

12 The words that is somewhat broader and  
13 doesn't trigger all of this is "gear." And if I might  
14 say just one or two things about it, the Court -- the  
15 government used the word "gear" in its 1997, 2001, 2002,  
16 and 2010 opinion letters, although they take different  
17 substantive positions.

18 They quote the word "equipment" from this  
19 Court's decision in Alvarez, and the word "equipment" is  
20 there twice, but the word "gear" is used 28 times. And  
21 a month ago, when I was here and the construction was  
22 still going on outside, there was a sign outside, and it  
23 depicted a worker with an arrow pointing to and  
24 labelling his hardhat, his goggles, his work gloves, and  
25 his boots.

1           And it said, "Do not enter without proper  
2 gear." So --

3           CHIEF JUSTICE ROBERTS:                   So what about heavy  
4 duty pants -- you know, blue jeans that somebody -- the  
5 thick ones that you use because the work environment  
6 will involve -- you know, grease and hot things and all,  
7 but that you wouldn't necessarily -- or a particular  
8 worker wouldn't wear off the steel mill site?

9           Is that clothing designed to protect against  
10 work hazards? Or is it -- some people would wear that  
11 outside the steel plant; other people wouldn't.

12          MR. SCHNAPPER:                   Certainly, people wear blue  
13 jeans under all sorts of circumstances.

14          CHIEF JUSTICE ROBERTS:               Yes, yes, but there  
15 are heavier-duty blue jeans that are made out of a  
16 particular fabric that you would see commonly in the  
17 steel mill, but you maybe wouldn't see commonly outside.

18          MR. SCHNAPPER:                   If -- if there was something  
19 identifiable in the -- in the -- in the mill that was --  
20 that was a hazard, that might fall there. But we have  
21 also taken the position -- and I'm not quite sure -- I  
22 am not familiar with these particular kinds of  
23 clothes -- items, that things that you would wear for --  
24 that weren't designed to deal with hazards wouldn't  
25 be -- wouldn't be in our carveout.

1           Thank you very much.                   I'd like to reserve  
2       the balance.

3           CHIEF JUSTICE ROBERTS:                  Thank you, counsel.  
4           Mr. DiNardo.

5           ORAL ARGUMENT OF LAWRENCE C. DiNARDO  
6           ON BEHALF OF THE RESPONDENT  
7           MR. DiNARDO:                          Mr. Chief Justice, and may it  
8       please the Court:

9           When Congress enacted 203(o), the  
10          Portal-to-Portal Act had already relieved employers of  
11          the obligation to pay for changing into or out of  
12          ordinary clothing. There is little question that 203(o)  
13          was directed at the sort of clothing that, absent  
14          203(o), could be deemed to be a principal activity, the  
15          changing into or out of clothing that was not already  
16          excluded by the preliminary and postliminary exclusion  
17          in the Portal-to-Portal Act.

18          Congress referred in 203(o) to time spent  
19          changing clothes -- to time spent changing clothes that  
20          is excluded from the workday, pursuant to an  
21          agreement -- a collective bargaining agreement. It was  
22          in the context of an agreement with the labor  
23          organization that the time would be excluded.

24          Collective bargaining takes place around  
25          activities and determines how certain activities are to

1      be treated. Collective bargaining does not focus on  
2      whether or not a shirt is clothes or a pair of pants are  
3      clothes or protective eye gear, and that is how the  
4      statute was written.

5                Given those two points, the term "clothes"  
6      as used in the statute was intended to encompass the  
7      work outfit industrial workers were required to change  
8      into and out of, to be ready for work. That's the  
9      logical conclusion of --

10              JUSTICE SOTOMAYOR:                  Does that include a  
11      SCUBA tank?

12              MR. DiNARDO:                  Your Honor --

13              JUSTICE SOTOMAYOR:                  Because you can wear  
14      anything to be ready for work. I -- my own inclination  
15      is to say that a respirator unit on your back is not  
16      clothes, the way a SCUBA tank isn't. So it can't be  
17      just something that covers your body.

18              MR. DiNARDO:                  If the labor --

19              JUSTICE SOTOMAYOR:                  Or ready for work.

20              MR. DiNARDO:                  If the labor organization and  
21      the employer, for whatever odd reason, would decide that  
22      part of the outfit you need to be ready to go to work  
23      included the tank -- it doesn't make a lot of sense  
24      because it would make more sense to put the tank on when  
25      you get to the location where you are going to perform

1       your principal activities.

2           But were they to do that, that's what this  
3       statute empowered them to do. And in terms of custom or  
4       practice, I should mention this --

5           JUSTICE SOTOMAYOR:           Then why didn't -- why  
6       wasn't the statute written in that way?

7           MR. DiNARDO:              It wasn't written that way --

8           JUSTICE SOTOMAYOR:           Why wasn't it written --  
9       I mean, they use very specific words, "changing  
10      clothes." That's, in my mind, narrower than your  
11      definition.

12          MR. DiNARDO:              Well, Your Honor, they -- they  
13      use those words with other words when they say, "any  
14      time spent in changing clothes," that the labor  
15      organization and the employer agree shall be excluded.  
16      They don't say it in the abstract.

17          It is pursuant to an agreement.           And a  
18      custom or practice, and the case law will bear this out,  
19      is an agreement. It is not unilateral action, Your  
20      Honor. It is by either very open acquiescence or  
21      long-term acquiescence --

22          JUSTICE BREYER:              Yes, what I think he's  
23      saying is this, that my puzzle was, why was this a big  
24      deal for the unions? All they have to do is keep their  
25      mouths shut, and the employer is going to have to go to

1 them and say, we want this in the agreement.

2           But he says, you haven't read those words  
3 "custom or practice," and if you see the words "custom  
4 or practice," you'll see that an awful lot of businesses  
5 or firms or manufacturing across the country actually  
6 has long had a custom or practice where they didn't pay  
7 for that -- you know, they didn't exclude it, or they  
8 didn't -- so in those circumstances, it's the union  
9 that's going to have to go to the employer and say,  
10 please put some other words in the agreement, so we get  
11 this out of the statute. And now, I have no idea -- I  
12 think that's what his point was.

13           And, of course, this is an empirical  
14 question in part of that kind of point, which is  
15 logically sound, affects a certain number of workers in  
16 industries. And I would next be curious if either you  
17 or the SG or anyone has some estimate of what we are  
18 talking about quantitatively.

19           MR. DiNARDO:           So, for the first part of the  
20 question, the notion of custom or practice is a notion  
21 of agreement or, at the very least, long-time  
22 acquiescence. If a union is not able to get a provision  
23 in a labor contract that satisfies it on this subject,  
24 it seem -- it simply needs to object to the nonpayment.

25           And then the question becomes is this

1      clothes changing preliminary or postliminary under the  
2      Portal Act and, therefore, not work? Or is this a  
3      principal activity that, absent an agreement under  
4      Section 203(o), is work and must be paid?

5                The notion that custom or practice is  
6      something that an employer can unilaterally adopt is  
7      simply false. It -- there must be the union's  
8      agreement, either expressly, as there has been for  
9      60 years in this labor contract between the Steel  
10     Workers and U.S. Steel, that this entire block of time  
11     will be excluded; or a union must say, by its silence  
12     or -- absent an agreement -- a formal agreement, but its  
13     verbal agreement, this is acceptable to us, we need not  
14     be paid for this beginning-of-the-day block of time.

15               And our suggestion that the test ought to be  
16      what these parties agree will be part of the work outfit  
17      that will start the day is, in large measure, a  
18      recognition of the way collective bargaining operates.

19               A labor union and an employer don't say,  
20      should there be pay for putting the hat on or putting  
21      the jacket on? The discussion surrounds what do we do  
22      about this 10 minutes or 5 minutes or 3 minutes or  
23      15 minutes that precedes active, productive work? Do we  
24      include that activity?

25               Now, granted, Your Honor, they -- they said

1 any time spent in changing clothes pursuant to a  
2 collective bargaining agreement because that was the  
3 nature of the debate that preceded the 1949 amendment.

4 The Department of Labor said, perhaps some  
5 clothes changing is not preliminary or postliminary,  
6 perhaps it is a principal activity. They started the  
7 discussion around clothes changing.

8 But the industrial practice that was being  
9 debated was this beginning-of-the-day activity, the  
10 locker room activity of getting yourself invested in the  
11 outfit you need to wear to be ready for work.

12 JUSTICE GINSBURG: Mr. DiNardo, in this  
13 case, does it matter if we take your position that  
14 anything you need to wear to be ready for work or the  
15 government's position -- and I think it was the Seventh  
16 Circuit's position, too -- that equipment is different  
17 from clothes?

18 But, here, the Seventh Circuit said the  
19 equipment that's involved, hard hats, glasses, earplugs,  
20 respirator, none of those things -- that they -- they  
21 take de minimis time, so we don't have to worry about  
22 them.

23 In this case, will it make a difference if  
24 we go your way and say, everything worn counts; or the  
25 government's way, saying, well, that these clothes

1 count, but equipment can be distinguished?

2 MR. DiNARDO: So in our particular case,  
3 Your Honor, this does not matter. The -- the items, the  
4 hard hat, the earplugs, the protective eye gear, and the  
5 respirator are not at issue in this case. The -- the  
6 lower court said the time is de minimis, and it doesn't  
7 matter.

8 Clearly, the items here are clothes. The  
9 government agrees they're clothes. They're clothes by  
10 any measure, by any test. But on a going-forward basis,  
11 this notion that there is a dichotomy between clothes  
12 and equipment is a problem.

13 JUSTICE KAGAN: Well, what would it matter?  
14 Could you give a few examples of when it would make a  
15 difference, the -- the difference between your test and  
16 the government's test?

17 MR. DiNARDO: Well, it'll make a difference,  
18 Your Honor, in -- in all of those circumstances, where  
19 part of the outfit that you put on to wear to be ready  
20 to work is not something that one might, absent an  
21 industrial context, look at and say, intuitively, that's  
22 clothing.

23 JUSTICE KAGAN: Well, like what, that's not  
24 de minimis?

25 MR. DiNARDO: So, for -- for example --

1 well, in many respects, I should say, these sorts of  
2 items are, in fact, de minimis. It takes seconds for a  
3 police officer to put a -- a vest on that has -- that's  
4 made of Kevlar, for example, a modern fabric that can  
5 protect, and yet, it's specialized, but it's a matter of  
6 seconds.

7           But that's the sort of argument you would  
8 leave the lower courts to deal with. Is -- is that  
9 vest -- one might call it equipment, the government  
10 might, we don't know, or they might call it clothing.  
11 And here's an opportunity to deal with that in a  
12 definitive sort of way.

13           JUSTICE KAGAN:           I guess it just seems that,  
14 in most of these cases, everybody is just going to say  
15 it takes two seconds to put on a pair of eyeglasses. So  
16 I guess I'm -- I'm struggling with why you and the  
17 government are fighting so hard about the proper test.

18           MR. DiNARDO:           Well, again, we're not  
19 fighting that hard because they -- they urge affirmance.  
20 But the proper test -- I would suggest this: As --as  
21 the court of appeals mentioned, is this clothing or  
22 equipment, and it answered its own question, well,  
23 really it's both. The problem with trying that  
24 dichotomy is you'll leave everyone to argue is this  
25 particular item "equipment"?

1           So is -- is the -- is the worker in the meat  
2       factory's chain-link vest -- vest or shirt, they call it  
3       a shirt, but it's made out of chain link -- is that  
4       equipment, or is that clothes?

5           JUSTICE SCALIA:           I think -- I think the  
6       government is -- you and the government are fighting  
7       simply because the government is being principled. The  
8       word of the statute is "clothes." And nobody would  
9       consider eyeglasses or a wristwatch or some of this  
10      other specialized equipment to be clothes. I mean, the  
11      word is what it is.

12       And -- and, I mean, it's wonderful to say,  
13      we can eliminate all the problems by -- you know, saying  
14      everything is clothes -- you know, everything, no matter  
15      what, wristwatch, eyeglasses. Well, yes, it makes a --  
16      a lovely world.

17       But it does not adhere to the words of the  
18      statute, which says, "clothes." Doesn't that mean  
19      anything? Everything is clothes.

20       MR. DiNARDO:           It -- it does mean something,  
21      but it must be read as part of any time spent --

22       JUSTICE BREYER:           Why would it be difficult?  
23      Why not just say clothes -- at least from your point of  
24      view, clothes are -- are those items that have, as a  
25      significant purpose, the covering of one's body. That's

1 not the purpose of eyeglasses; it's not the purpose of  
2 wristwatches; it's not the purpose of -- of cameras held  
3 around your neck; it's not the purpose, even, of an  
4 iPod.

5 MR. DiNARDO: The -- the statute is activity  
6 focused. If we look at --

7 JUSTICE BREYER: Well, is there anything  
8 wrong with what I just said?

9 MR. DiNARDO: There is, Your Honor.

10 JUSTICE BREYER: What?

11 MR. DiNARDO: So what of opening your  
12 locker? Opening your locker --

13 JUSTICE BREYER: Opening your locker is not  
14 clothes.

15 (Laughter.)

16 MR. DiNARDO: Yet the time is excluded. Yet  
17 the time is excluded.

18 JUSTICE BREYER: Well, that's not -- but  
19 still, we're back to the statute, which says, "clothes."

20 MR. DiNARDO: Yes.

21 JUSTICE BREYER: And, therefore, what's  
22 wrong with the definition I just proposed?

23 MR. DiNARDO: Well, as a practical matter,  
24 labor organizations and employers don't negotiate that  
25 way. They don't say, we'll pay you for the eyeglasses,

1 but we won't for the shirt.

2 JUSTICE BREYER: Well, that's -- that's up  
3 to them how they negotiate. But -- but the statute  
4 says, "clothes," so we would have to pay for the clothes  
5 time -- they'd have to pay for the clothes time unless  
6 it's in the collective bargaining agreement or -- you  
7 know, if it's in the collective bargaining -- unless  
8 it's in the collective bargaining agreement.

9                   MR. DiNARDO:                 Unless it's in the  
10                  collective --

11 JUSTICE BREYER: Or custom and --

12 MR. DiNARDO: And then you look up the  
13 definition of clothes, and it's any covering for the  
14 human body, and it includes accessories. So --

15 JUSTICE BREYER: No. Why -- why does it  
16 include eyeglasses? Eyeglasses do not have as a  
17 principal -- as a significant purpose the covering of  
18 one's body.

19 MR. DiNARDO: The safety glasses that go  
20 over the eyeglasses are, in fact, designed to cover  
21 the -- part of the face. They are designed to cover  
22 part of the face. If we leave --

23 JUSTICE SCALIA: Well, if it doesn't matter,  
24 why make a liar out of us? You know, why -- why make us  
25 say something that -- that everybody knows is not true,

1       that everything you put on is clothes.

2            MR. DiNARDO:            But it's not everything you  
3       put on. It's a work outfit --

4            JUSTICE SCALIA:           Earrings, eyeglasses,  
5       whatever.

6            MR. DiNARDO:            It would be the work outfit  
7       that the employer and the union agreed you need to have  
8       on your person to be ready for work.

9            JUSTICE SCALIA:           You -- you cannot get that  
10       very precise limitation out of the word "clothes." You  
11       just can't. And say it's protective gear for work, it's  
12       not other protective gear. Okay? It's only those  
13       earrings you have to wear for work, otherwise, earrings  
14       are not clothes. Ah, but if they're required for work,  
15       they become clothes.

16           That -- it doesn't make any sense.

17           MR. DiNARDO:            It's -- it's less required for  
18       work as it is -- the Congress was after allowing this  
19       block of time to be dealt with by --

20           JUSTICE BREYER:           So maybe we can call them  
21       "constructive clothes," which means they're not clothes.

22           (Laughter.)

23           MR. DiNARDO:            And it's less the individual  
24       nature of the item as it is the activity. Is this part  
25       of the activity of changing your clothes? And if part

1 of the activity of changing your clothes is taking off  
2 your eyeglasses and putting them in your locker and  
3 putting safety glasses on, that piece of time is covered  
4 by the statute, even though, in reality, the union  
5 wouldn't bargain over that piece of time.

6 They would argue -- they would bargain over,  
7 what shall we do with this pre-shift attire. Leaving --  
8 go ahead, Madam --

9 JUSTICE SOTOMAYOR: Your -- your definition  
10 would include somebody spending an hour of putting on a  
11 suit of armor, if he's going to be a jouster. It would  
12 include the space people who put on that complicated  
13 white suit that has all the connections to equipment.

14 MR. DiNARDO: Well, I would suggest -- I  
15 would suggest that what it's made of should not matter,  
16 so the material shouldn't matter.

17 JUSTICE SOTOMAYOR: Right.

18 MR. DiNARDO: The function shouldn't matter.  
19 In terms of the time --

20 JUSTICE SOTOMAYOR: If function doesn't  
21 matter, then how do we define "clothes"?

22 MR. DiNARDO: The function doesn't matter  
23 because --

24 JUSTICE SOTOMAYOR: Function covers the  
25 body.

1                   MR. DiNARDO:           Sometimes, it could be for  
2 protection; sometimes, it could be for identification.  
3 So some people have to wear certain things, so they're  
4 identified. Other people have to wear things at work,  
5 so they are protected. I think that shouldn't matter.

6                   And the length of time, frankly, shouldn't  
7 matter because the agreement must be bona fide. The  
8 statute has a protection for a union that doesn't  
9 extract something in exchange for agreeing that this  
10 increment of time will be excluded.

11                  The -- the statute requires that the labor  
12 agreement be a bona fide labor agreement. So the -- the  
13 obligation of bargaining and -- and fulfilling your  
14 obligation of fair representation is built into the  
15 statute.

16                  I believe there's been a great deal of focus  
17 on an item-by-item investigation of these issues in  
18 countless numbers of these cases, and that is the wrong  
19 approach.

20                  JUSTICE ALITO:           Well, nothing has been said  
21 about the word "changing." Maybe you could say  
22 something about that. Isn't it -- isn't it awkward to  
23 refer to the changing of clothes when all that the  
24 person is doing is putting on clothing on top of  
25 clothing that the person is already wearing?

1           MR. DiNARDO:                   So, Your Honor --

2           JUSTICE ALITO:                  That's not the way the term  
3           is normally used, is it?

4           MR. DiNARDO:                  So I would say this: In this  
5           particular case, the facts of this case, and the  
6           record's replete with declarations, the most common  
7           event is a worker comes to his locker, takes off some of  
8           their clothes, they have to -- they're required to put  
9           their personal long underwear shirt on and long  
10           underwear pants on, then the gear that's in the -- the  
11           gear -- then the clothing that's in the picture.  
12           That's -- that's the actual events in this case.

13           But if someone were to come in and -- in  
14           their long underwear and not have to take their outer  
15           clothes off and just put the items that are in the  
16           record on, then the question becomes have they changed  
17           because they have simply layered?

18           I would say this:               It's not the most common  
19           use of the term "changing," but it is a -- it is a  
20           definition of changing, "to make different." I think it  
21           would happen here. So it's actually not the facts of  
22           this particular case.

23           I think the word is certainly broad enough  
24           to encompass -- and, lastly, it would make no sense in  
25           the statute to allow the personal idiosyncrasies of

1 those people coming to work, someone who decides to  
2 layer their items over what they have on, someone else  
3 who decides to take them off before they layer.

4 I would say that reading the statute as an  
5 activity-based statute is consistent as well with the  
6 notion of washing, which is in this statute. We don't  
7 think of turning a shower on, necessarily, or retrieving  
8 a towel as washing. The statute excludes time spent  
9 washing, and we don't try to drill down what exactly is  
10 washing.

11 We say, in close cases, the determining  
12 factor should be the agreement the labor organization  
13 has reached with the employer. Leave all of this  
14 craziness about whether a particular item is covered or  
15 not covered to the parties closest to deal with it, the  
16 labor organization and the employer, who have had, in  
17 this particular case, 60 years of dealing with this.

18 If you say to a worker at U.S. Steel, "Go  
19 change your clothes," they will know exactly what you  
20 meant. And they will take that to mean, "Put my hard  
21 hat on. Put my protective eyewear on."

22 JUSTICE SCALIA: Are there no non-unionized  
23 employers that -- that have to confront this problem,  
24 and they have to pay -- they have to pay for work time,  
25 no?

1           MR. DiNARDO:           Your Honor -- so the statute  
2       only covers -- 203(o) only applies in unionized  
3       workplaces. It's only where a labor organization and  
4       an --

5           JUSTICE SCALIA:       Yes, and everybody else has  
6       to pay for the -- for the changing time, right?

7           MR. DiNARDO:         Unless it's preliminary or  
8       postliminary.

9           JUSTICE SCALIA:       It is, so you -- so you  
10      have the same issue there, don't you?

11          MR. DiNARDO:         Well, yes -- it's --

12          JUSTICE SCALIA:       And -- and the union cannot  
13      pull your chestnuts out of the fire.

14          MR. DiNARDO:         Well, of course, there is no  
15      union present, so the question becomes is it preliminary  
16      activity, is it ordinary clothes changing that's not a  
17      principal activity, et cetera?

18          There's -- clearly, this applies in  
19      unionized workplaces. There is a representative of  
20      these employees. They can bargain over these blocks of  
21      time, over these activities, and determine how best to  
22      deal -- how best to deal with it.

23          Thank you.

24          CHIEF JUSTICE ROBERTS:    Thank you, counsel.

25          Mr. Yang.

1 ORAL ARGUMENT OF ANTHONY A. YANG,  
2 FOR UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING THE RESPONDENT  
4 MR. YANG: Mr. Chief Justice, and may it  
5 please the Court.

6 JUSTICE SOTOMAYOR: Mr. Yang, I will let you  
7 speak, but could you answer Justice Scalia's question?  
8 Would our -- if we were to adopt your colleague's  
9 broader definition, would it affect a preliminary and  
10 post-activity definition?

11 MR. YANG: Not at all. We only get to the  
12 question of Section 3(o) when a preliminary activity is  
13 deemed to be so integral and indispensable to the  
14 primary work that itself is primary work and, therefore,  
15 would be compensable.

16 So as, for instance, the Court held in  
17 Steiner, there was chemical plant workers who the  
18 donning and doffing of their clothing for work purposes  
19 was so indispensable to their chemical factory work, it  
20 was deemed to be essential. In that context, you might  
21 have a collective bargaining agreement that allows the  
22 union, on behalf of the employees and the employer, to  
23 provide for an alternative method of compensating this  
24 type of work.

25 And, in that context, there are two central

1       inquiries that I would like to address today. First,  
2       are the items clothes? We think "clothes" actually has  
3       some textual meaning here and imposes a limit, which I'd  
4       like to discuss a bit further later.

5           But, second, if the employee puts on both  
6       clothes and some non-clothes items, does the overall  
7       process still, nevertheless, constitute the activity of  
8       changing clothes?

9           Now, we didn't have to go in very deep depth  
10      into that question in our brief because all the items  
11      here are clothes. But I think it would be actually  
12      quite useful to discuss, for a little bit, the activity  
13      of changing clothes and then to discuss the specifics.  
14      I think it would help the Court out at least in  
15      providing a more general rule.

16           The activity of changing clothes is used in  
17      the -- in the statute to exclude time spent in changing  
18      clothes. Congress used the gerund "changing" to  
19      describe an activity. It is a verb form that's modified  
20      by changing, not by clothes. So it is an activity of  
21      changing clothes. We think that activity also includes  
22      ancillary matters.

23           So, for instance, if a worker comes into a  
24      locker room, spends some time doing the combination on  
25      the locker, opens it up, take -- opens the locker, that

1      is not actually changing clothes, per se, but it's part  
2      of the activity of changing clothes.

3            So, for instance, if the worker also happens  
4      to put on some goggles, pop in an ear plug, maybe even  
5      snap on a utility belt in the context of changing  
6      clothes, those things are part of "changing clothes," as  
7      part of the statute. Now --

8            JUSTICE KAGAN:                    So, then, what does separate  
9      you from Mr. DiNardo? Now, you're sounding exactly the  
10     same.

11            MR. YANG:                        Well, no, I don't think so  
12     because, on the margin, we are largely the same. I  
13     think, for the mine run of cases, we will be at the same  
14     result.

15            However, there are some marginal cases where  
16     there is a collection of equipment -- we would -- what  
17     we would deem to be equipment, which is put on by an  
18     employee that is so significant that it no longer can be  
19     fairly treated in conjunction with changing clothes.

20            JUSTICE KAGAN:                  Like what?

21            MR. YANG:                        Well, this is an area -- an issue  
22     that comes up frequently in the meat packing industry.  
23     And I can explain -- I need to explain a little bit  
24     about the facts to explain why we think that that is a  
25     much more difficult question.

1           So, in the meat packing industry, for  
2 instance, particularly meat packers that are rendering  
3 large portions of the beef, either with electric saws or  
4 very sharp knives or similar instruments, they actually  
5 have to put on what the government considers to be -- or  
6 has considered to be items of equipment.

7           So, for instance, the meat packer might have  
8 a chain mail, kind of like armor sleeve, chain mail  
9 gloves, another sleeve, chain mail kind of all over the  
10 front end, a belly guard -- a Plexiglas belly guard.  
11 This is something that is very rigid, you can't even sit  
12 down on it.

13           And, in fact, you have to sterilize it in a  
14 chemical bath before you go into the plant. You have  
15 metal arm guard -- or a metal -- or, now, Plexiglas  
16 because of weight -- arm guard on the front that helps  
17 to deflect blows for your non-knife arm.

18           These types of things, we think, would not  
19 normally be thought of as clothing. And so, when you  
20 put on a smock, either before -- you know, or under or  
21 over it, we think that the overall process there might  
22 not be fairly deemed to be considered changing clothes.

23           JUSTICE SOTOMAYOR:                 So what's the  
24 difference? Isn't this what some courts have described  
25 as de minimis activity, as they did with the safety

1       glasses and the hat and the ear plugs? How about a  
2       metal apron, that some meat packers only do a metal  
3       apron?

4            MR. YANG:                   Right. Well, that may well --  
5       this is, again, going to be somewhat fact-dependent, and  
6       I don't mean to provide a general rule for all cases.

7            JUSTICE SOTOMAYOR:           Well, actually, that's  
8       what we are looking for, so why don't you?

9            (Laughter.)

10          MR. YANG:                   No, no. I think, while we are  
11       trying to general principles, they're not necessarily  
12       going to resolve all cases, and they're not always going  
13       to make the case easy, and I think, on the margin, and  
14       the meat packer does involve a marginal case, you're  
15       going to have the questions.

16          If it's just one item --

17          JUSTICE ALITO:               What you just said -- what  
18       you just said, I find quite confusing. I can make a  
19       list of things that are considered to be clothing. One  
20       of them would be a jacket, perhaps. One would be a  
21       vest. And if you tell me that a vest is not clothing if  
22       it's made out of metal, then I don't know why Mr.  
23       Schnapper is not right that a jacket is not a jacket if  
24       it's got extra flame protection -- protecting chemicals  
25       in it.

1                   MR. YANG:                 Our point is a linguistic point,  
2 which is to say I don't think all these things are  
3 normally characterized as clothing. For instance, there  
4 are certain items in the body that are so distinctive in  
5 form and function, they don't have normal analogues in  
6 what you would find people wearing in ordinary  
7 garments -- you know, in everyday life, that it's deemed  
8 to be different.

9                   There are certain armor-type things, and I  
10 think maybe because, etymologically, armor, with  
11 the unique military context, tends to -- we tend to call  
12 these things equipment.

13                  But, for instance, the belly guards, In IBP,  
14 this Court called those things "protective equipment,"  
15 and I think that's the normal use of the term in that  
16 context. Just because you might say, oh, it's a vest, a  
17 chain mail vest for the specific function, particularly  
18 when aggregated with the rest of the equipment used in  
19 the meat packing industry, makes it an arguably  
20 different case.

21                  This case, however, I think is quite  
22 different, and I wouldn't necessarily use the term "de  
23 minimis." We agree with the general concept that the  
24 Seventh Circuit reached, but de minimis is a term of art  
25 in the FLSA. It involves, as we explained to the Court,

1       in our Tum brief, which is the companion case to -- to  
2       IBP, it requires an aggregation of all the time deemed  
3       to be de minimis. There is a regulation, Section  
4       785.47, that imposes some other requirements.

5                  We think it's not so helpful to use that  
6       term, but we do think --

7                  JUSTICE ALITO:                   But when somebody in the  
8       meat packing industry puts on something that would be  
9       clothing, but also puts on all these other things that  
10      you say are not clothing, now, you would say in that  
11      situation putting on all this additional stuff is not  
12      ancillary, and that is for what reason? Because it  
13      takes more time in relation to the clothing or the  
14      number of non-clothing items exceeds the number of  
15      non-clothing items? What does that mean?

16                 MR. YANG:                   Well, I think it means that when  
17      the process is predominantly involving equipment and not  
18      clothes, we would think that it's different. And -- and  
19      I don't think there's really any question that there has  
20      to be a line.

21                 For instance, if an employer had an employee  
22      go out and, as part of the changing clothes, also go and  
23      collect your tools for the day and assemble them in your  
24      tool belt, no one would say that's changing clothes,  
25      even if, at the end of the -- all of that, you put on

1       your top -- your jacket and you walked out.

2           So we're simply trying to draw a line that I  
3   think faithfully reflects the common understanding of  
4   clothes in this context. At the same time, we believe  
5   that the term "clothes" is quite broad.

6           JUSTICE BREYER:           Do you have any estimate on  
7   the empirical -- there are only two people that know,  
8   the Department of Labor and the AFL-CIO, and they didn't  
9   tell us, the latter. So -- so what we're thinking of, I  
10   think, is workplace hazard clothing. Okay?

11          And the problem, I think, that was raised is  
12   that the union can't stop -- can't -- can't -- can't  
13   make an agreement about this, without a lot of trouble  
14   anyway. They can't just shut up, in other words, and  
15   see that the -- there'll be compensation because there's  
16   a custom or practice in the industry of giving -- of not  
17   giving them compensation.

18          MR. YANG:               I'm not -- there has to be --

19          JUSTICE BREYER:           Do you follow? Do you  
20   follow --

21          MR. YANG:               There has to be a custom or  
22   practice under the collective bargaining agreement.

23          JUSTICE BREYER:           Yes, yes. But they've  
24   had --

25          MR. YANG:               The specific one.

1           JUSTICE BREYER:                 -- collective bargaining  
2        agreements in steel forever.

3           MR. YANG:                         But --

4           JUSTICE BREYER:                 All right? So if we go  
5        back to -- to 1949 or 1952 and they entered into some  
6        big deal agreement, I mean, what was the custom or  
7        practice at that time? I don't know. I suspect you  
8        don't know. And I -- I wonder if the Department of  
9        Labor knows.

10          MR. YANG:                         Well, I think the custom --

11          JUSTICE BREYER:                 I wonder if anyone knows.

12          MR. YANG:                         -- on the record in this case --

13          JUSTICE SCALIA:                 I don't know.

14          MR. YANG:                         -- I think the custom of practice  
15        was to not separately compensate.

16          JUSTICE BREYER:                 All right. So there is --

17          MR. YANG:                         And so -- so that was actually  
18        made express --

19          JUSTICE BREYER:                 Exactly.

20          MR. YANG:                         -- in this case. And I think  
21        that's actually illustrative of the type of things that  
22        we're talking about. Remember, we're talking about a  
23        100 percent cotton. If you look at the label -- it's in  
24        the record. A 100 percent cotton jacket and pants.  
25        You've got -- you know, arm guards, wrist -- wristlets

1 and leggings, but these things are quite analogous to  
2 what we would have in normal clothing.

3 And then you have some things that are on  
4 the edge. But we think that, when that's done in  
5 conjunction with changing clothes, that it's incidental,  
6 just as an employee might put on a name tag after they  
7 dress or put on their ID badge for security purposes or  
8 snap on a utility belt --

9 JUSTICE SCALIA: You want us to say it's  
10 incidental, instead of de minimis?

11 MR. YANG: That's -- that's our preference.

12 JUSTICE SCALIA: What -- what's the  
13 consequence of calling it "incidental"?

14 MR. YANG: Well, we think it avoids  
15 complications and problems with the special doctrine  
16 that applies more generally in the FLSA, which is the de  
17 minimis -- De Minimis Time Doctrine.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Schnapper, you have four minutes.

20 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

21 ON BEHALF OF THE PETITIONERS

22 MR. SCHNAPPER: I'd like to address a number  
23 of questions that were asked earlier and then to respond  
24 to a point my brother made.

25 With regard to the question of

1       Justice Breyer, it is the experience of the United Food  
2       and Commercial Workers that the position companies take  
3       with regard to this -- these items is simply another  
4       bargainable unit -- item, like a holiday. It is not  
5       treated by them as something unions are entitled to.

6                  Justice Ginsburg, you asked why it matters  
7       here and whether the items -- how we characterize the  
8       items about which the government would disagree with the  
9       company, at least in isolation. And it matters for two  
10      reasons that have to do with the broader context of the  
11      Fair Labor Standards Act.

12                 First, as we explained in our reply brief,  
13       there is an unchallenged rule that -- that an employer  
14       has to pay a worker for carrying tools or other things  
15       needed to do the job to the -- the work station.

16                 If anything in this list isn't clothes and  
17       the workers have to have it at the work station, it  
18       would presumptively fall within the tool-carrying rule.  
19                 So it's very important to the company in this case that  
20       all of it be clothes.

21                 It's also important under the position that  
22       the government took in its brief in Tum, which was a  
23       companion case to Alvarez, that the government's  
24       position, with which we agree, is that once there is any  
25       non-203(o) exempt item, it starts the calculation of the

1 de minimis time, which then includes, not only the time  
2 for that item, but the travel time that follows.

3 It starts the de minimis clock. If that's  
4 right, then if anything in this case isn't 203(o)  
5 exempt, the company would have to change its practice.

6 Justice Kagan, you asked more broadly why  
7 the test matters. And I think the government was moving  
8 in this direction. There is generally few, if any,  
9 cases involving poultry or -- poultry processing in  
10 which there's stuff that would -- would meet the, well,  
11 if I had a photograph of it, it looks like clothes test.  
12 It's almost all gear.

13 And so in that industry, it's of enormous  
14 importance the difference between the government's  
15 position in its -- at least in its brief and the  
16 company's position. That has great implications for  
17 those -- those plants.

18 Finally, if I might respond to a point that  
19 the government made, the government has introduced  
20 another concept, I think, that's not set forth in our  
21 brief, but I want to address, and that's that, in  
22 addition to the process that would go on, on any of our  
23 standards of separating out what things are clothes and  
24 what things are not clothes, the government would then  
25 overlay that with an ancillary test.

1           And if it's predominantly clothes, then the  
2 whole thing counts as clothes; if it's predominantly  
3 non-clothes, it goes the other way.

4           I don't know.                 I think that's another area  
5 of uncertainty you shouldn't inflict on the lower  
6 courts, and it's not consistent with the statute. The  
7 statute doesn't say, "changing clothes and ancillary  
8 stuff." I'd agree about opening the locker. It's --  
9 it's necessary to change your clothes.

10          But when you start taking things which, the  
11 government would agree, by themselves aren't clothes,  
12 and say, well, this -- this falls within changing  
13 clothes, even though it's not clothes because it's sort  
14 of happening at the same time, seems to me you're  
15 opening up another can of worms that should stay closed.

16          JUSTICE KAGAN:                 Mr. Schnapper -- I'm sorry.

17          JUSTICE ALITO:                 What is the practice in the  
18 poultry industry to which you referred? Are those  
19 unionized workplaces and have they bargained on this  
20 issue?

21          MR. SCHNAPPER:                 I believe about 60 percent  
22 are and the rest are not. The poultry industry filed a  
23 brief --

24          JUSTICE ALITO:                 And under -- where they have  
25 collective bargaining agreements, are they compensated

1 for this time or not?

2 MR. SCHNAPPER: Generally, not. Generally,  
3 not. The -- the unions have not been able to negotiate  
4 that. It's the arrangement that -- that I've just  
5 described. And -- and, of course, there are a large  
6 number of nonunionized plants, they have to pay for all  
7 this.

8 JUSTICE KAGAN: Do you happen to know why  
9 the government hasn't issued a regulation on this? It  
10 seems the quintessential question of statutory  
11 interpretation to which we would normally defer to the  
12 agency.

13 Why hasn't -- this is really a question to  
14 Mr. Yang, but do you just happen to know, given the  
15 history of all this and all this -- these guidance  
16 documents, why they've never just like come to  
17 everybody's aid and issued a regulation?

18 MR. SCHNAPPER: I do not know, Your Honor.

19 JUSTICE SCALIA: Too complicated is why.  
20 (Laughter.)

21 MR. SCHNAPPER: If the Court has no further  
22 questions.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 Counsel.

25 The case is submitted.

1                   (Whereupon, at 12:06 p.m. the case in the  
2 above-entitled matter was submitted.)

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